371. Draft article 8 gave rise to similar reactions. In addition to going beyond the scope of a framework agreement, the article was viewed as superfluous since the Vienna Convention on the Law of Treaties had already laid down the general procedure concerning amendments.

372. As regards the placement of the above provisions, a few representatives suggested that they form part of the main body of the future instrument, with articles 7 and 8 being included among final clauses. Most of the representatives who commented on the provisions in the annex, however, favoured their incorporation in an optional protocol so that the States which decided to become parties to the framework agreement would not be obliged to accept the obligations provided under them at the same time.

373. One representative expressed the view, which was endorsed by another representative, that such plausible concepts as non-discrimination and equal right of access to the procedures should be included in the body of the draft text. He added that, although the idea of facilitating procedures and promoting the functioning of civil liabilities systems in order to provide due compensation to victims was correct, his delegation felt that in regulating such complex problems the possibilities for adopting the instrument were diminished. In his view, an optional protocol might be a solution, as had been suggested in the Commission.

3. Other comments

374. Two representatives commented on the Special Rapporteur's proposal for an annex II on fact-finding and settlement of disputes (A/CN.4/427/Add.1). One of them said that the matter should be determined by the watercourse States themselves in documents agreed between them on the basis of the framework agreement being prepared by the Commission. Another representative, after indicating that his country shared the Special Rapporteur's view that it was advisable to attempt to resolve any differences at the technical level before proceeding to invoke more formal procedures, raised the question whether inquiry should involve a separate mechanism. He pointed out that, in actual fact, a request to initiate an inquiry presupposed a use of the watercourse by one of the riparian States which encountered opposition or at least caused certain fears, and that it was difficult to envisage a fact-finding procedure which was not preceded by a stage of direct consultations between the States concerned. He therefore suggested that the Commission should include the inquiry mechanisms among the other settlement procedures. He furthermore agreed that a time-limit should be placed on the negotiations, inasmuch as the lack of a time-limit would enable a reluctant party to oppose indefinitely the application of the conciliation procedure. He had no objection to obligatory arbitration, i.e., resort to arbitration on the initiative of one of the parties when conciliation failed. While viewing the draft text as a good starting-point, he expressed concern at the dependent situation of a State which planned a new use of a watercourse in relation to the State that might possibly be affected. In his opinion, there was no doubt that the draft text favoured the State situated downstream since, by claiming that a new use might prejudice its own use, that State received a sort of right of veto over the activities of the State situated upstream.

375. One representative commented on articles provisionally adopted at previous sessions. He suggested that the definitions of terms used in the draft articles which were scattered throughout the text should be transferred to article 1, on use of terms. He noted that, while article 2 stated that the draft articles applied to uses of international watercourses and to measures of conservation related to those uses, article 6 also mentioned the development and protection of watercourses, article 7, paragraph 1 (e), spoke of protection and development in addition to conservation and article 9 used the two terms "utilization" and "protection". In his view, article 2 should cover the development, protection, utilization and conservation of watercourses.

376. Finally, attention was drawn to what was termed a possible serious omission from the draft articles, namely the intensive work done in recent years under the auspices of the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP) on the consequences, including the consequences for water resources, which might stem from a change in the global climate. It was suggested that, on the basis of that work, consideration be given to the question whether it would be relevant to include in the draft articles provisions encouraging watercourse States to cooperate with a view to jointly facing the consequences which might arise for the watercourse in question as a result of global warming.

E. STATE RESPONSIBILITY 1/

1. General comments

377. Many representatives welcomed the fact that the Commission had been able to steer the right course in dealing with the central remaining topic in the building of an international legal order and urged the Commission to finalize the topic before the end of the Decade of International Law. They felt that, as international cooperation expanded, many activities on the part of States entailed the need to determine responsibility in the event of a wrongful act. Reference was made in this connection to the topics on the Commission's agenda which had a bearing on the concept of State responsibility - the draft Code of Crimes against the Peace and Security of Mankind, the international watercourses topic and the topic "International liability for injurious consequences arising out of acts not prohibited by international law". It was felt that an international convention codifying the general norms on State responsibility and its consequences could solve many problems of cooperation among States. In that connection, regret was expressed that the Commission had often failed to provide a clearer survey of its work on the topic, especially in years when a report from the Special Rapporteur had not been forthcoming or had not been considered owing to lack of time. In line with their wish to see the finalization of the topic well before the end of the century, several representatives urged the Commission to present at an early date a brief outline of the results so far achieved together with an indication of what remained to be done and the time period within which the project might be finished.

378. Some representatives stressed that the Commission in drafting articles on State responsibility was not involved only in mere codification, but also in the progressive development of the law where there were lacunae. In this context, it was noted that in an attempt to clarify law on remedies the Special Rapporteur had relied on certain aspects of the domestic law of torts including very complex concepts for addressing problems which, at least structurally, were the same as those arising in international law. Reference was made in this connection to article 8, paragraph 4, and article 9, which had given rise to certain objections in the Commission based on the concern for maintaining a certain degree of flexibility. The view was expressed that, in order to meet the needs of the international community, the Commission needed to find an appropriate balance between "progressive development" and "codification" and that, while progressive development added dynamism to international law and helped to make it consonant with current needs, excessive progressive development could be unacceptable to many States and might ultimately contribute to the failure of the project.

379. In terms of the overall approach to the topic, a number of representatives insisted on the need to take into account present-day realities. Some representatives emphasized that remedies should not primarily be viewed from the perspective of injuries to aliens, for such an approach could disregard the

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1/ The debate in the Sixth Committee was primarily centred on the approach to, and the core idea behind, the three articles introduced by the Special Rapporteur in his second report and discussed in the Commission.

interest of the smaller and developing States. The Commission was urged to ensure that the expectations of the international community, and in particular of those States which had come into existence after the classical rules of international law on the topic had been formulated, were not frustrated. The Commission was also invited to keep pace with contemporary notions of international law, such as the concept of international crimes for which responsibility of States is invoked, and to recognize the opportunity provided by recent shifts of attitude on the part of the major Powers in accepting the notion of compulsory third-party dispute settlement. One of the representatives in question remarked that the report of the Special Rapporteur covered too many old cases, particularly of arbitral awards made in the late nineteenth or early twentieth century, during the colonial era, such as the Boxer Revolt case. In the view of that representative, the judicial decisions as well as diplomatic practices of the imperialist era could not and should not be invoked as precedent.

380. Emphasis was on the other hand placed on the importance of analysing rigorously past State practice when the Commission was engaged in codification as well as in progressive development of the law. Analysis of States' past behaviour and its consequences were viewed as essential in formulating rules for the future. Besides, it was remarked, the practice established by old judicial decisions was balanced by taking into account the diplomatic practice, through which much of general international law was developed.

381. As regards the purpose of the project, some representatives felt that it should be oriented towards the elaboration of residual rules inasmuch as the future development of the law would probably lead to the establishment of specific rules in specific fields of international law such as the use of nuclear energy, economic relations, the global environment, human rights and the rules of warfare, etc. The articles should therefore be drafted in a general and flexible manner.

382. Commenting on the articles proposed by the Special Rapporteur in his second report, one representative remarked that reparation for a delict had much in common with that in the case of the violation of a treaty or the commission of an international crime. He therefore found it logical, on the face of it, to suppose that the provisions of draft articles 8, 9 and 10 would, to some extent, apply in cases of delicts as well as crimes. He concluded that the objective assessment of these articles could only be made in the light of corresponding provisions in respect of international crimes which the Special Rapporteur intended to propose in his future reports.

383. Another representative stressed that, in formulating the general principles of State responsibility, five criteria should be taken into account: first, clear, compensable damage must exist (not just possible damage); secondly, such damage must be directly or indirectly attributable to the responsible State; thirdly, the damage must be contrary to what is legal (the injured party must not be legally obligated to bear the injury); fourthly, there must be no concurrent causes providing any legal justification for the damage; and fifthly, there must exist a direct or indirect, but in any event appropriate, causal link between the act or omission attributable to the State and the compensable damage. The Special Rapporteur's view that "injuries to expectations" should not necessarily be covered

by the general rules under discussion but could be covered by specific treaties was described as a realistic one.

384. It was noted that the approach taken in articles 8 to 10 was uneven. Sometimes issues were stated in terms of the obligation of the wrongdoing State and, at other times, in terms of the rights of the injured State.

385. As regards the types of injurious consequences which could result from a wrongful act, some representatives agreed that, in broad terms, they could be divided into "material" and "moral" damage. Damage to a State or an individual could be of both types. Material damage was relatively easy to define, but "moral" damage was not, since it did not entail a patrimonial loss. Moral damage was analysed in terms of suffering or the moral injury to the victim, whose rights were affected, as well as to his honour, prestige or dignity. These were intangible notions that must nevertheless be defined to some extent, even if it was difficult to measure them in monetary terms and compensate them by means of pecuniary reparation or satisfaction.

386. One representative expressed regret that the Commission had failed to indicate the specific issues on which the expression of views by Governments would be of special interest for the continuation of its work, as had been requested in General Assembly resolutions, of which resolution 44/35 was the most recent. He observed that too many questions were raised by the draft articles on State responsibility for any delegation in the Sixth Committee to address them all. He therefore expressed concern that without guidance from the Commission comments were likely to be made at random, and that some delegations might even feel tempted not to state their positions at all, fearing that their view might not be of use for the continuation of the Commission's work on the topic.

2. Comments on the draft articles proposed by the Special Rapporteur in his second report

Article 8. Reparation by equivalent

387. Most representatives agreed that pecuniary compensation was the logical and the most common mode of reparation when restitution in kind was impossible or could not ensure complete reparation. They felt that it would in fact be immoral if the State committing the wrongful act was not required to make reparation in an equitable manner for the damage caused. They also agreed that, in broad terms, pecuniary compensation was the main form of reparation for economically assessable damage, whether material or moral, while satisfaction was the appropriate form of reparation for moral damage which was not economically assessable. In their view, article 8 was based on a well-established principle of international law, and the dictum of the Permanent Court of International Justice in the Chorzów Factory case provided an excellent point of departure. The theory underlying the formulation of article 8 appeared to correspond to the traditional distinction drawn between satisfaction, the form of reparation best suited to moral injury suffered by States, and pecuniary compensation, which was more suitable to material or moral damage suffered by the injured State's nationals. They therefore agreed with the

thrust of article 8. One of those representatives stressed that the objective of the principle of "reparation by equivalent" was to restore for the injured party the situation which would have existed if the harmful act had not occurred. It therefore implied that the reparation should be identical or equal to the damage, namely, neither less nor more than such damage. Although in international practice the criterion was not applied in all cases, consideration of the subject required taking all possibilities into consideration and seeking solutions that were generally acceptable, both in cases where there was a contractual responsibility and in those where there was no contractual responsibility. Furthermore, the draft articles should not have the effect of restricting the autonomy of the parties. It might therefore be useful to insert a provision which expressly stated that specific types of compensation represented acknowledgement of responsibility for, and reparation of, the damage.

388. One representative, however, found the article difficult to accept, since it formulated abstract rules based on the assumption that States were equal, an assumption which in his view was not borne out by facts and would put developing States in a disadvantageous position vis-à-vis developed States, with detrimental consequences for the right to development of the former. Article 8, as formulated, was not in his view conducive to the progress of international law.

389. As regards the title of the article, most representatives endorsed the view expressed in the Commission to the effect that it should be changed to "pecuniary compensation", since the substance of the article dealt with monetary damages. Besides, the current formulation, "reparation by equivalent", implied that compensation was equivalent to damage, a matter which, according to one of them, was yet to be established.

390. As regards paragraph 1, while most representatives endorsed the idea underlying both alternative versions of the paragraph, they felt that, in terms of drafting, it might be useful to specify more explicitly the scope of application of the article, which did not become fully apparent until paragraph 2. In terms of drafting, they stressed the need to state explicitly the right of the injured State to compensation and the obligation of the wrongdoer State to make pecuniary compensation. Most of them preferred alternative (a), as it appeared more flexible, simpler and clearer. A few preferred alternative (b), since version (a) had the drawback of seeming to imply that the object of pecuniary compensation was to re-establish the situation that would have existed if the wrongful act had not been committed, whereas in fact pecuniary compensation was resorted to where such re-establishment of the situation was not possible. For a few others, there were no significant distinctions between the two alternatives. A view was also expressed that the two alternatives seemed to be based on a notion of partial restitution in kind which was to be supplemented by compensation. That assumption, according to this view, was not entirely compatible with the very nature of restitution. It would perhaps be preferable to reserve the term "restitution in kind" for the case in which such restitution fully re-established the situation that would have existed if the wrongful act had not been committed. One representative felt that it was important to have, in paragraph 1, a specific reference to the generally recognized principle that pecuniary compensation must be effective, which involved the question of the currency of the compensation.

391. As regards the Special Rapporteur's view that States injured as a result of a violation of rules concerning human rights or the environment could seek remedies under paragraph 1 of article 8 and paragraph 1 of article 10, one representative felt that, given the fundamental importance of the principles involved and the very special nature of the commitments undertaken, the question of the range of potentially affected States and "legal injury" had to be considered very carefully. He felt, however, that it would be preferable not to use in the article a language which might be appropriate in the context of human rights or the environment, since that language might not necessarily be suitable in other fields. He opted for a more general language.

392. As regards paragraph 2, views varied in respect of the expressions "economically assessable damage" and "moral damage". Most of the representatives who spoke on these issues supported the use of the expression "economically assessable damage". For them, that expression was a self-evident description, for it meant that in order to be compensated, damage had to be assessable in economic terms. They felt that the expression "economically assessable" was preferable to the adjective "material", which could be interpreted in the narrow sense of physical damage, not covering damage to certain rights such as intellectual rights. A few other representatives felt that the expression "economically assessable damage" should be defined more clearly to avoid controversial interpretations. One of them remarked that the economic assessability of damage should be based on the degree of damage rather than on the financial status of the offending State, as was suggested by a few members of the Commission. One representative found the expression objectionable because, in his view, any definition thereof, however carefully drafted, would still be too subjective.

393. As regards the expression "moral damage", the views were divided. Some wondered what it meant or whether it had a place in paragraph 2. Reference was made in this context to the absence of uniformity in State practice as regards both the forms of deprivation which were characterized as "moral injury" and the criteria used for measuring and compensating them. It was also noted that the expression "moral injury" in the context of paragraph 2 seemed to imply that only such "moral damage" as was "economically assessable" was included and that it was illogical to assume that no "moral damage" to the State was economically assessable while some "moral damage" to individuals could be so assessed. The view was expressed that there was no need to single out damage to nationals in either article 8 or article 10 because if damage to a national could be economically assessed it would give rise to an obligation of compensation and if it could not there would be an obligation of satisfaction. Some representatives felt that the reference to "moral damage" should be transferred from article 8 to article 10, which was more suited to deal with remedies for moral injury. Others, however, favoured the retention of that expression in paragraph 2 of article 8 for the reasons explained in paragraph 365 of the report of the Commission, and in particular because the issue was closely connected with the obligation of respect for human rights. One representative noted that paragraph 2 mentioned "moral damage" to State's nationals and felt that it would be preferable to explicitly include "material damage" to those nationals as well.

394. As regards paragraph 3, there was broad agreement among the representatives who commented on it that the damage to be compensated included both damnum emergens

and lucrum cessans. The rule laid down in paragraph 3 was found therefore a priori acceptable. However, the definition of lucrum cessans was not considered entirely satisfactory. According to some representatives, not only was the phrase somewhat oddly turned, but it also failed to specify what was to be considered loss of profits. The hope was expressed that the Commission would arrive at language which would indicate clearly that such profits should be actual and not hypothetical.

395. As regards paragraph 4, a number of representatives agreed that the determination of damage resulting from a wrongful act necessarily depended on the standard of causation to be applied and that paragraph 4 was intended to provide a guideline which could be adapted to each specific case, depending on a particular circumstance. The remark was however made that the paragraph, as currently drafted, did not make clear whether or to what extent the phrase "uninterrupted causal link" would take into account the principles of foreseeability or proximity. Expressions such as "exclusive cause" or "immediate cause" were mentioned by some as possible criteria to limit the scope of responsibility. It was also suggested that the expression could be kept in the paragraph and an appropriate explanation provided in the commentary to indicate the Commission's understanding that "the cause must not be too remote or speculative" and that there should be "a sufficiently direct causal relationship" between the wrongful act and the damage, as some members of the Commission had argued. A few members, on the other hand, found the expression "uninterrupted causal link" acceptable.

396. As regards paragraph 5, some representatives endorsed the wording proposed by the Special Rapporteur but suggested that the paragraph be made into a new article since the principle it put forward applied to all the other articles on reparation. Others, although not disputing the principle enunciated in the paragraph, disagreed with its formulation. They felt, for example, that the term "contributory negligence" had a special meaning in common-law systems which was different from that intended in the paragraph and would therefore cause confusion. It was also deemed inappropriate to speak of the compensation being "reduced accordingly"; in practice, compensation was not reduced but was simply applied to only that part of the damage which had been caused by the wrongful act. The suggestion was made to replace "shall be reduced" by "may be reduced". One representative questioned the need for the paragraph.

Article 9. Interest

397. There was broad agreement among those who spoke on the article that interest was part of pecuniary compensation, the subject of article 8. For some representatives, a separate article on the issue was unnecessary and might even lead to controversy, since State practice with regard to interest rates differed from one State to another. It was noted that international tribunals usually determined the date and modalities of payment by taking into account a number of circumstances, and that flexibility should therefore be maintained. It was therefore suggested that the article be deleted or, if a provision on interest was felt necessary, that it be included in article 8 as paragraph 3.

398. One representative, however, supported the retention of a provision on the obligation to pay interest in order to ensure complete reparation. He remarked

that the Commission was in danger of limiting the obligation of offending States to pay interest in two ways which were incompatible with the obligation for full compensation: first, wherever the provision on interest was eventually placed - as a separate article 9, in paragraph 3 of article 8 or elsewhere - it should contain an explicit affirmation of the offending State's obligation to pay interest not just in cases of lost profit, but whenever that was necessary to ensure full compensation; secondly, compound interest should be awarded whenever that was necessary to ensure full compensation. He therefore expressed disappointment that the Commission was reluctant even to consider the possibility that compound interest could be a necessary component of full compensation. He added that the Commission should consider whether it was appropriate to lay down a formula for the calculation of interest, rather than leaving such matters to competent judicial bodies.

Article 10. Satisfaction and guarantees of non-repetition

399. Various views were expressed on the content and the wording of the article. Some representatives recognized that satisfaction had often been granted as an autonomous form of remedy. One representative, however, noted that with one exception the cases cited by the Special Rapporteur in support of the doctrine of satisfaction all predated the Charter of the United Nations. He therefore urged the Commission to consider carefully whether the law of satisfaction continued to be one of general application, and in what circumstances satisfaction was not an inherent element of restitution or pecuniary compensation.

400. As regards paragraph 1, some representatives found the reference to "legal injury" inappropriate and favoured its deletion. Thus, one representative stressed that satisfaction in the forms indicated in the paragraph was not due for every wrongful act but was reserved for instances of moral injury, traditionally equated with injury to a State's dignity, honour or prestige. He therefore suggested that the text should make it perfectly clear that satisfaction was the remedy to be provided for moral injury in its traditional sense and not for legal injury, which was a much wider concept. He added that it might even be desirable to define more precisely the concept of "moral injury", perhaps through a reference to the injured State's dignity, honour or prestige.

401. Some other representatives, while not asking for the deletion of the expression "legal injury", felt that the expressions "moral injury" and "legal injury" should be reconsidered with great care. It was remarked that the clarity of the distinction between the two types of injury had not only theoretical but also practical value, particularly in cases involving rules of international law on the protection of human rights and of the environment. One representative felt that the concept of "legal injury" should be retained, in addition to that of "moral injury", as a justification for the request for, and award of, satisfaction.

402. As regards the nature of satisfaction, some representatives favoured the deletion of the reference to "punitive damages". For them, giving a punitive character to satisfaction was inconsistent with the nature and consequences of delict and ran counter to the principle of sovereign equality among States. One

representative suggested that the Commission should consider whether there were cognizable standards for the award of punitive damages for an injury not susceptible of remedy by restitution or pecuniary compensation. Another representative stressed that international State responsibility was not a penal responsibility, and that was the reason why his delegation could not approve the introduction of the concept of international crimes attributable to States in article 19 of Part One of the draft. Without casting doubt on the fact that satisfaction, or even the obligation to make reparation imposed by international law upon the wrongdoer State, might to some extent be in the nature of a punishment of that State, he felt that paragraph 1 of article 10 should not contain terms suggestive of the vocabulary of criminal law, such as "punitive damages".

403. A few representatives, on the other hand, endorsed the Special Rapporteur's conclusion that satisfaction was characterized by its retributive or punitive nature. They disagreed with the view that the concept of "punitive damages" might be inconsistent with the principle of the sovereign equality of States and pointed out that, although in some cases "satisfaction" took the form of the payment of a sum, that sum could not in reality be labelled as compensation. While not insisting that the word "punitive" be used, they maintained that, to a certain extent, "punishment" or "retribution" was simply the other side of the coin of "satisfaction": the injured State was satisfied in seeing the wrongdoing State suffer as a result of its act. They agreed however that in order to prevent abuses there should be a provision, along the lines of paragraph 4, to clearly indicate that satisfaction should in no case include "humiliating demands" on the State which had committed the wrongful act.

404. As regards the forms of satisfaction, there was general agreement that they should neither be humiliating nor impair the sovereignty of the State which had committed the wrongful act. Some doubts were expressed concerning the assertion in paragraph 3 of the article that a finding of wrongfulness by a competent international tribunal might constitute in itself an appropriate form of satisfaction. It was pointed out that, while such a finding might be an adequate form of reparation for a legal injury, satisfaction for moral injury as such would require some form of positive conduct on the part of the offending State. Some doubts were also expressed as to whether monetary compensation could be considered a form of satisfaction. While one representative felt that satisfaction should not, in principle, violate a State's domestic jurisdiction, another drew attention to cases of human rights violations where assurances against repetitions could be given only if the State's legislation was changed.

405. As regards guarantees of non-repetition, a few representatives felt that while it was for the injured State and the judge or the third party decision-maker to decide whether such guarantees constituted adequate satisfaction, it might be appropriate to have a separate provision on the matter. The view was expressed that such guarantees should not be limited to cases of moral injury, but should also be envisaged in respect of economically assessable damage. It was also said that guarantees of non-repetition of the internationally wrongful act should not be imperative in cases of force majeure and failure to foresee and that compensation and satisfaction might on occasion coincide when the injured State and the wrongdoer State agreed on a political settlement.

406. Other comments on article 10 included the remark that it would be preferable to have a general provision on satisfaction without indicating the specific forms it might take and the observation that in choosing the form of satisfaction, the importance of the obligation breached and the degree of negligence of the wrongdoer State should be taken into consideration. The point was also made that article 10 was to a large extent based on the assumption that disputes would be settled by judicial means, even though in reality mandatory jurisdiction was the exception rather than the rule. It was therefore suggested to dispense with the concept of satisfaction and to proceed from the assumption that a negotiated settlement would in most cases be the objective of the parties.

3. The impact of fault on the forms and degrees of reparation

407. Some representatives briefly commented on the impact of fault on the forms and degrees of reparation. In general, they agreed that the matter raised important and complex questions and should be carefully studied by the Commission. Reference was made in that context to the problem of attribution, which was all the more thorny as some members of the Commission believed that fault by State agents should not be imputed indiscriminately to the State. One representative furthermore found it difficult to understand why, if fault was a necessary element for measuring State responsibility as was agreed in paragraphs 408 to 412 of the report, the concept had been eliminated from Part One of the draft.

408. One representative held the view that, in principle, fault did not play a major role in determining the consequences of an internationally wrongful act. He remarked that once it had been determined that there had been a breach of an international obligation, there was little room for attenuating the obligation of restitutio in integrum and its alternatives. He added that since it was difficult to elaborate general rules for determining the impact of fault in the remedial context it was better to subsume it under the broad notion of appropriateness or reasonableness.

409. Other representatives supported the position that fault played a significant role in determining the consequences of a wrongful act. Some among them observed that, apart from the fact that even delicts might present different degrees of gravity, it had to be remembered that the project also covered crimes and that the concept of fault was an indispensable part of the evaluation of any international crime committed by a State through its agents or authorities.

F. RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (SECOND PART OF THE TOPIC)

1. General comments

410. Satisfaction was expressed at the progress achieved on the topic at the forty-second session of the Commission and at the fact that 11 draft articles had been referred to the Drafting Committee.

411. As regards the usefulness of further work in the area, some representatives stressed the topic's general significance and its potential to contribute towards strengthening the legal basis of international organizations. One of them in particular endorsed the view of the Special Rapporteur that the work of the Commission on the topic should proceed. She pointed out that much had already been done in pursuance of the General Assembly mandate and on the basis of an outline prepared at the Commission's thirty-ninth session and that such efforts should not be wasted by dropping or deferring a topic for which necessary time seemed to be available. Another representative observed that it was too late to raise doubts as to the usefulness and the necessity of codifying the topic and that, having received the mandate from the General Assembly, the Commission had no choice but to proceed with the item, with respect to which there were many gaps to be filled and problems to be solved.

412. While recognizing the importance of the topic, some among those representatives advocated a cautious approach to it. One of them, after stressing that the relationship of the topic to existing agreements governing the privileges and immunities, legal personality or status of international organizations of a universal character had to be carefully considered, expressed the hope that the Commission would conduct its deliberations with great care. He remarked that if the Commission's objective was to produce a set of new unified rules applicable to all international organizations such rules would inevitably provide minimum standards only and would be much narrower than those established under existing conventions - a questionable result from the point of view of strengthening the international organizations' legal basis. Several representatives similarly acknowledged the difficulties which the relationship between existing régimes and the draft articles under consideration was likely to give rise to and urged the Commission to be circumspect in prescribing general norms governing international organizations.

413. Other representatives expressed doubts as to the feasibility and desirability of establishing uniform rules on the subject inasmuch as each international organization had its own characteristics, aims and functions, requiring particular privileges and immunities. One of them stressed that, while it was true that certain basic principles, such as the principle of the equality of member States and that of the independence of international civil servants, were to be found in all existing agreements relating to the status of international organizations, it was also true that those agreements had been negotiated on a case-by-case basis and with due consideration being given to the functional requirements of the particular organization concerned and, in particular, to the nature of its activities. Another felt that the International Law Commission had been right to defer consideration of the topic and should bear in mind that there were many other more urgent questions of international law. His country, which was host to several United Nations bodies, saw no urgent need for the elaboration of general rules governing relations between States and international organizations, on the one hand, because the treaties establishing those institutions contained general provisions on their legal status, and on the other, because there were specific multilateral treaties governing privileges and immunities. In addition, he went on to say, host countries concluded specific headquarters agreements which covered practically all the questions dealt with in the draft articles in question.

414. As for the basic orientation of the work, the Special Rapporteur's approach met with approval. Several representatives agreed that the Commission should elaborate an instrument which could supplement the relevant existing international agreements. One of them felt that the draft should contain only general provisions, which could be modified according to the characteristics of each individual case so as to meet the functional needs of the organization concerned. Another said that the Commission should confine itself to identifying the gaps to be filled and solving the problems revealed by the practice of previous decades and should elaborate either supplementary rules or a framework agreement containing a statement of general principles intended to facilitate the interpretation of existing provisions. Still another representative advocated a framework instrument which codified existing rules and filed lacunae.

415. Other representatives, however, felt that the Commission should not proceed on the assumption that a convention on the topic was necessarily to be aimed at. One of them stressed that, since the subject had already been covered by conventions which, on the whole, were proving satisfactory, there was no need for haste and that the Commission could envisage, at a leisurely pace, the preparation of a set of alternative rules for purposes of reference, as appropriate. It was also said that work on the topic should continue only in the direction of developing guidelines and recommendations which States and international organizations might adopt as they saw fit.

416. As regards the scope of the topic, comments mostly focused on the categories of organizations to be covered by the draft articles. These comments are reflected in paragraphs 418 to 420 below.

417. On another aspect of the same question, one representative indicated that he was not convinced that matters such as the capacity of an international organization to conclude treaties or to file an international claim, referred to in paragraph 441 of the report, fell within the scope of the topic.

2. Comments on the draft articles proposed by the Special Rapporteur in his fourth report

Article 1. Terms used

418. Agreement was expressed with the Special Rapporteur's view that it was necessary to be pragmatic and therefore to adopt a simple definition of an international organization, without listing the various types of organizations. It was also said that paragraph 2 should be retained, except for the phrase "or the internal law of any State", which was outside the purview of the draft articles.

Article 2. Scope of the articles

419. Some representatives endorsed the approach of limiting the scope of the draft to international organizations of a universal character. It was said in particular that regional organizations, which were by definition distinct from universal organizations, should be expressly excluded from the scope of the draft articles.

420. Other representatives were of a different view. One of them suggested that relations between States and international organizations of a non-universal character should be examined at an appropriate time, as to do otherwise would be short-sighted. Another representative felt that the scope of the topic should be broadened to encompass regional organizations such as those referred to in Chapter VIII of the Charter of the United Nations. He stressed that since the Charter attributed specific competence to such organizations it would be illogical not to consider them in the context of relations between States and international organizations and the Special Rapporteur and the Commission should accordingly take into account the parameters established under Chapter VIII and incorporate regional organizations, such as the Organization of American States (OAS) and the Organization of African Unity (OAU), into the draft if it was feasible to do so.

421. Several representatives expressed doubts on the phrase "when the latter have accepted them". One of them said that it appeared to introduce a requirement of recognition of international organizations through the obscure and imprecise criterion of "acceptance", a requirement which threatened to introduce elements of controversy all the more undesirable as the draft articles applied only to international organizations of a universal character and which, being contrary to the notion of objective legal personality adopted by the International Court of Justice, would be a regressive element. He added that the provisions of the draft articles did not deal directly with the central issue of legal personality in the domestic law of non-member States: draft article 5 was concerned solely with "legal personality under international law and under the internal law" of Member States, and there was therefore even less justification for an "acceptance" requirement in paragraph 1 of article 2.

Article 3. Relationship between the present draft articles (Convention) and the relevant rules of international organizations

Article 4. Relationship between the present draft articles (Convention) and other international agreements

422. While one representative found draft article 4 useful, another felt that the words "without prejudice to" in both draft articles 3 and 4 created an ambiguity. In his view, the relationship between the draft articles and similar agreements should be regulated by the rules of treaty law, in particular the 1969 Vienna Convention on the Law of Treaties.

423. It was further remarked that the parallel between draft article 4, which stated that the future Convention was without prejudice to existing agreements and would not preclude the conclusion of other international agreements, and draft article 11, which enabled the scope of privileges and immunities to be limited by mutual agreement of the parties concerned, made it difficult for the Commission to formulate general rules in that area.

Articles 5 and 6

424. The remark was made that while the primary concern was with legal personality under international law, problems would arise if no account were taken of legal personality under the internal law of member States or of the host country. Agreement was therefore expressed with the suggestion that there should be separate articles on legal personality under international law and legal powers deriving therefrom (including the capacity to conclude treaties and the capacity to file an international claim) and legal personality under internal law and legal powers deriving therefrom (including the capacity to contract, to acquire and dispose of movable and immovable property and to institute legal proceedings).

425. The view was furthermore expressed that the consequences of legal personality could not be determined once and for all, as draft article 5 attempted to do.

Article 7

426. Some representatives raised the question whether international organizations should continue to enjoy absolute immunity, despite the changes which had occurred in the field of State immunity. One of them said that it seemed extremely strange that States could, through an international organization they had set up, enjoy immunity with respect to transactions which, had they performed them separately, would not be covered by State immunity, with the result that third parties dealing with the organizations would bear the risk of default by some of the States parties, or of internal difficulties within a particular organization which the States parties were in a position to control. He recalled that, historically, the immunity of international organizations had developed by analogy with diplomatic immunity and that international organizations had largely had delegated and representational functions, so much so that doubts had been entertained as to the separate legal personality of international organizations. The current situation, he went on to say, was very different: there were more international organizations than States, and those organizations were able to engage in their own right in transactions, including of a commercial and financial nature, some of which would no longer be, if carried out by States, the subject of jurisdictional immunity.

427. Several other representatives similarly found it difficult to accept the idea that international organizations could, for functional reasons, enjoy an absolute immunity from jurisdiction, which would be greater than the immunity enjoyed by their member States. Attention was drawn in this context to the constituent instruments of international financial institutions such as the International Bank for Reconstruction and Development (IBRD), the International Finance Corporation (IFC) and the International Development Association (IDA), which conferred only limited immunity.

428. By way of compromise one representative, after noting that it appeared to be widely accepted that the autonomy, independence and functional effectiveness of an international organization required some degree of immunity from legal process, suggested that, given the rapid proliferation of international organizations for vastly different purposes and notwithstanding the fact that absolute immunity

applied to the United Nations system, privileges and immunities should not automatically be granted to each new - or even to every existing - international organization. Another suggestion was that draft article 7 should be divided into two parts, the first providing immunity from legal process in accordance with the relevant norms of the constituent instruments and the second providing immunity for property, funds and assets.

429. With reference to the second sentence of the draft article, some representatives favoured a more flexible approach. One of them remarked that under the proposed text it was not possible for an international organization to waive its immunity from execution: such a provision contradicted the principle of consent and raised the question why an express waiver, authorized by the competent organization, should be ineffective. Another remark was that an international organization should have the capacity to contractually establish a waiver, on condition that such a waiver be explicit.

430. On the other hand, one representative felt that the wording of the second sentence should be strengthened, and suggested the following formulation:

> "Waiver of immunity from legal process shall not be held to imply waiver of immunity in respect of the execution of the judgement or order, for which separate waivers shall be necessary."

Article 8

431. One representative felt that paragraph 1 of the draft article should be strengthened. After observing that under the current practice States were required not only to refrain from entering the premises of an international organization but also to protect those premises, he expressed preference for the formulation in article 22 of the 1961 Vienna Convention on Diplomatic Relations and the elimination of the phrase "used solely for the performance of their official functions", which restricted the principle of inviolability of international organizations. He furthermore urged the Commission to specify in the text that no agent of the host State could enter the premises of an international organization without its consent.

432. Another representative expressed general agreement with the thrust of the draft article. She considered as a useful one the caveat that the inviolability should apply to premises "used solely for the performance of their official functions" and insisted on the need for international organizations to be immune from expropriation, as any other conclusion could prove highly impractical, particularly with regard to the United Nations Headquarters building.

433. The same representative also supported paragraphs 2 and 3 of the draft article.

Article 9

434. Some representatives supported the draft article, which, it was stated, was justified by the functional approach to privileges and immunities and served as a safeguard against possible abuses.

435. One representative, however, felt that article 9 went into too much detail. While he agreed with the principle that international organizations ought not to become a refuge for fugitives from justice of the host country, he did not see the need to include the category of persons wanted on account of flagrans crimen, since that concept might not be the same in the legal systems of all countries. He furthermore suggested that the last phrase ("or against whom a court order or deportation order has been issued by the authorities of the host country") be replaced by a phrase such as "or against whom a deportation order has been issued by the courts of the host State", which would be adequate to protect the interests of the host country.

Article 10

436. The draft article was described as a normal and necessary provision in agreements of the type under consideration.

Article 11

437. One representative viewed the draft article as pointless inasmuch as it introduced an element of uncertainty as to the scope of article 10. He also remarked that, in individual cases, it might be difficult to define the nature and scope of the "functional requirements" to be taken into consideration in limiting the provisions of article 10 (a) and (b).

438. Other representatives considered that the draft article afforded insufficient protection to third parties in their dealings with international organizations. The remark was made that the proposed article, which was designed to limit, in the light of the functional requirements of each particular organization, the very extensive scope of its rights under the draft's other provisions, would not ensure the necessary flexibility and balance between the interests of the international organization concerned and those of the host State, and indeed of all its member States and their nationals. The rather vague reference to "the functional requirements" of the organization was viewed as inadequate, since it was merely suggested as a basis for waiver by the organization of the immunity conferred by other draft articles; such waivers could take into account any relevant matters, whether or not they related to "functional requirements".

G. INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW 8/

1. General comments

439. A number of representatives stressed the importance of the topic as well as its timeliness in view of the growing realization of the need to prepare a legal instrument in respect of international liability, most specifically with regard to transboundary environmental and ecological harm. In their opinion, the increasing threat to the environment could not be removed or minimized without appropriate regional and global efforts pursuing the same or complementary policies. They therefore emphasized the importance of linking the current work of the Commission to efforts being made elsewhere to protect the environment. Attention was drawn to the United Nations Conference on Environment and Development scheduled for 1992, and the hope was expressed that the work of the Commission would be, if not finished, at least brought to an advanced stage so that it could be presented at that Conference. Some of these representatives postulated the goal of the Commission in respect of the topic as the preparation of a framework agreement containing a limited set of binding general rules and guidelines and introducing into international law the general principles of international liability for transboundary harm as a result of lawful activities.

440. Some representatives, on the other hand, took a more cautious approach based on the current state of international law and the absence of consensus among States which, in their view, made the codification of liability for lawful activities a rather ambitious undertaking. They pointed to the scarcity of relevant State practice and judicial and arbitral decisions which led the Commission to engage in the progressive development of the law much more than in a codification exercise. One of these representatives felt that it would be more prudent for the Commission to confine itself to the elaboration of draft general principles on the topic, with a view to assisting States in the examination of specific questions. Another representative felt that the Commission should avoid postulating general principles and focus on the practical problems which caused the most difficulty. He stressed that many States were not yet prepared to accept a general rule on liability, but might submit to certain rules for carefully defined activities or for a specific geographical area, which would enunciate State obligations on a case-by-case basis, taking into account the special problems posed by certain specified activities or by the physical characteristics of the space in which they were carried out. In his view, many States would be reluctant to accept general rules for prevention and consultation of the type envisaged in the articles proposed by the Special Rapporteur. Those same representatives also felt that the Commission should be wary of attributing far-reaching consequences to lawful acts.

8/ The discussion centred on the general premise, the main approach and the scope of the topic. The specific articles of the outline proposed by the Special Rapporteur were less extensively commented upon.

441. Following the same general line, one representative advocated a functional sector-by-sector approach leading to separate legal instruments for specific activities and situations. He observed that such a functional approach might require different rules for hazardous activities, on the one hand, and harmful activities on the other: in the case of hazardous activities, damage would entail State responsibility if a primary rule of international law - for example, agreed regulatory measures - had been violated, or, in the absence of such primary rules, would be governed by a regime of strict liability, whereas in the latter case of harmful activities the matter would be approached within the framework of State responsibility, which would presuppose the determination of primary rules as to levels of permissible emissions, this basic principle being supplemented by the civil liability of the operator in cases where the source of damage could be identified and be associated with a private operator.

442. A few other representatives, while noting that there was a perceived divergence in, or absence of, State practice and while fully understanding the caution with which the Special Rapporteur was approaching his task, felt that the topic reflected the desire within the international community to build a new world based on law and order in which people could live in peace and harmony. In their view, the increasing interdependence of the international community as well as the need for the protection of the physical environment and the ecological balance demanded an approach that was carefully considered, realistic, innovative and bold. The remark was made that the term "liability" within that approach, in addition to placing a legal obligation on States to answer for their own actions, meant that there was an objective necessity for States to act in a responsible manner, in accordance with international law, and that they must be capable of such action. It was also noted that sometimes it was impossible for some States to cope in isolation with the consequences of disasters like that of the Chernobyl nuclear power plant.

443. As regards the possibility of treating activities involving risk and those involving harm together or separately, views were divided. Some favoured the first alternative, others preferred the second and still others felt that only activities creating the risk of causing transboundary harm should be covered. Those favouring joint treatment agreed with the Special Rapporteur's view that the two types of activities had more features in common than distinguishing features and that it was therefore possible to examine their legal consequences under a single regime. The common denominator was, in their view, particularly evident in matters relating to notification, information and consultations. They felt that it was even possible to include activities with harmful effect within the definition of activities involving risk since the former usually involved a certain risk of causing harm.

444. Those who favoured separate treatment of the two types of activities argued that the legal regimes to be applied to each of the two types of activities had different purposes: the aim of the regime intended for activities involving risk was prevention, while the aim of the regime relating to activities with harmful consequences was compensation. In their view, it was difficult to see how a single regime could be established for both types of activities without undermining either of those objectives. They further recalled the original purpose of the study of the topic - namely, the establishment of a liability regime for damage - which,

according to them, dictated a separate treatment of the two types of activities. They added that an exhaustive treatment of the obligations of prevention would only be justified if it were determined that non-compliance with those obligations would entail the international liability of the State, an issue which had not yet been resolved in the draft under consideration. They nevertheless found merit in addressing the question of risk in respect of certain types of activities in order to establish minimum regulatory standards for the prevention of transboundary harm and for cooperation among States. A few representatives, however, objected to the inclusion of the concept of risk in any form as the primary factor triggering liability. They remarked that, if the concept of risk were to be retained as relevant in determining liability, the scope of the topic would become narrow, since damage, even when considerable, would be excluded as long as it had resulted from low-risk activities.

445. A few representatives found it more practical and realistic to base the approach to the topic on the concept of risk alone, not only in respect of the obligation of prevention, but also in respect of the obligation to pay compensation. That approach, in their view, had a number of advantages: aside from making it possible to resolve the theoretical problems associated with the question of liability for the consequences of lawful activities, it would clarify the scope of the topic; distinguish it from State responsibility; and, finally, make the articles more likely to receive universal acceptance. Such an approach was also viewed as consonant with the emerging view in the Commission that the doctrine of strict liability did not currently exist as a generally recognized principle of international law.

446. Comments were also made on the need to coordinate the relationship between the topic in question and those of State responsibility and the law of the non-navigational uses of international watercourses.

447. In that context, one representative felt that there was a discrepancy between the proposed draft articles on prevention and those on liability. He was not sure how the former provisions fell strictly within the scope of the study. In his view, preventive rules had no direct relationship with the problem of liability unless the intention was to establish that their non-observance involved the international responsibility of the State of origin, in which case the question was one of State responsibility for wrongful acts. He concluded that, if the Commission still wished to continue its consideration of the behavioural obligations that States must respect in their territory with regard to activities that might have transboundary harm, it might find it advisable to make a clear distinction between the two parts of the study and reconcile the topic with the articles on State responsibility.

448. As regards terminological aspects, it was noted that no agreement had yet been reached on the use or the meaning of several vital terms or concepts such as the concepts of "acts", "activities", "risks", "harm", "appreciable or significant risk", "transboundary harm", etc. Some representatives felt that it would be wise to employ the terminology used in existing agreements. One representative suggested that the title be changed from "International liability" to "State liability", since, whatever the eventual decision of the Commission concerning the

liability of the operator, at least residual liability should remain with the State of origin.

449. One representative felt that the nature of the instrument being prepared by the Commission would to some extent affect the scope of and the approach to the topic. He remarked that if, for example, the Commission intended to produce a "framework" agreement of the type envisaged in the context of the topic "Law of the non-navigational uses of international watercourses", the draft could cover much broader types of activities, whereas if the intention was to establish minimum standards which would be legally binding on the parties to the future instrument, the scope might have to be narrower.

450. As regards, the working methods for the topic, the comment was made that the Commission and its successive Special Rapporteurs had devoted commendable efforts since 1978 to developing a schematic outline and producing draft articles and deserved all the more praise as progressive development of the law was involved and no established and extensive body of State practice and case law could be relied upon. It was suggested that, since the Commission had developed its study in directions which had been scarcely imaginable in 1978, increasing its scope to such an extent that completion of the work seemed a distant prospect, the Sixth Committee should take a fresh look at the topic, not article by article, but in broad terms, to see whether it agreed with the direction the Commission's work was taking, and might also consider assigning priority to some specific aspects, bearing in mind the current needs of the international community. To that end, it was proposed that the Commission present the Sixth Committee with an overall review of the status of its work on the topic and an indication of the direction it intended to take in the future.

2. Comments on chapters and articles as proposed by the Special Rapporteur

Chapter I. General provisions

451. As regards the question whether a general definition of the activities covered by the topic should be provided or a list of dangerous substances established, various views were expressed. Most representatives favoured a general definition and found a list of substances to be unhelpful and inappropriate. It was remarked in particular that the fact that a substance was included in the list as dangerous did not mean that the activity relating to that substance necessarily created a risk of transboundary harm, whereas such a risk might be created by activities which had no connection whatsoever with a dangerous substance. Thus, it was stated, a list would be of marginal usefulness and the effort involved in preparing it would not be justified. A second observation was that a list would unduly restrict the scope of the topic and would be more appropriate for a convention with a narrower application and limited to specific issues. A third argument was that such a list could never be exhaustive and would create loopholes. For the representatives in question, therefore, a general definition would seem more in line with the Commission's aim of arriving at a framework convention with universal scope.

452. In favour of the establishment of a list, it was stated that the reference to "substances" would appear a priori to allow for greater precision in delimiting the scope of the draft and therefore make the future instrument acceptable to more States. Reference was made in this context to the work carried out by the Committee of Experts of the European Committee on Legal Cooperation in relation to civil liability for dangerous activities. Some among the proponents of a list favoured an illustrative enumeration which would leave room for reasonable analogy. One of them indicated that he did not underestimate the problems associated with the preparation of such a list. He first pointed out that the choice of substances selected could not be made on the basis of exclusively technical criteria and that States still had to agree on the selection and on the fact that the problems which those substances might cause should be solved within the framework of the draft articles and not in another technical context or in a regional context; consultation with States would therefore seem to be indispensable in any case. He further remarked that, even if such a list was prepared, it would have to be updated, and that might cause practical difficulties since the draft would deal presumably with extremely heterogeneous categories of substances. He observed finally that, if the Commission tried to establish specifically to which activities or substances its draft applied, and a fortiori if it planned to give it the form of a convention, there would be a "shift" in the subject-matter, a shift from a study parallel to the study on responsibility for wrongful acts to a text of limited scope designed to be operational. He wondered whether such an orientation would be precisely in keeping with the current mandate of the Commission and whether there was not a risk of duplication of work done in other bodies.

453. As regards the threshold of risk or harm, some representatives favoured the concept of "significant risk or harm" over that of "appreciable risk or harm". They felt that the terms defined in draft article 2 were of a tentative nature and should be further refined. Other comments pertaining to chapter I included the remark that the definition of transboundary harm had rightly been expanded to encompass harm to the environment, the observation that subparagraph (g) of draft article 2 should indicate that the cost of preventive measures must be "reasonable" and the suggestion that draft article 4 (Relationship between the present articles and other international agreements) should be brought into line with the Vienna Convention on the Law of Treaties.

Chapter II. Principles

454. A few representatives commented on draft article 10 (Non-discrimination). It was pointed out that the draft article, which sought to place foreigners on the same footing as nationals as far as domestic remedies were concerned, should only be applicable between States with similar or comparable legal systems. Attention was drawn to the problem that would arise in the case where the State of origin had adopted lower standards of liability with respect to a particular substance than the injured State.

Chapter III. Prevention

455. Some representatives made general comments on this chapter. One representative felt that preventive measures were beyond the scope of the topic, while another expressed the opposite view and felt that procedural obligations of prevention should be given more prominence. The latter representative disagreed with the view that if the obligations of prevention were to be more stringent, i.e., if their breach were to lead to State responsibility, then the topic would be dealing with wrongful acts, not with acts not prohibited by international law. She also felt that the obligations of prevention should form the subject of a separate article rather than be combined with the obligations of "containment" or "minimization" of transboundary harm. Another representative held that the duty of prevention stemmed more from a general obligation of conduct and prudence, principally under the regime of international cooperation, than from the law of liability. He therefore insisted that work be carried out with the aim of developing the means of such international cooperation in the prevention of harm, even though he was uncertain whether that should be done at the level of the Commission. The comment was further made that a systematic review of the machinery actually employed in the practice of technical international organizations and in the international management of certain activities which were likely to cause harm would clarify the fundamental distribution between liability on the one hand and prevention in the strict sense of the other. It was also suggested to highlight the distinction between regulatory standards and guidelines for application. Another remark was that the provisions of chapter III should make clear that the primary duty of prevention lay with the State of origin. The point was made in this connection that, although potentially affected States obviously could not have a veto over activities in the State of origin, the latter should not enjoy carte blanche to conduct any act or activities it chose, regardless of possible transboundary harm.

456. The flexibility of procedural obligations was welcomed by some representatives, even though the remark was made that the obligations of assessment, notification and information imposed on the State of origin in draft article 11 (Assessment, notification and information), and for which cooperation among States was essential, must be applied at an early stage. Also in relation to draft article 11, one representative said that States should be under an obligation to collect information if certain dangerous substances were to be used in their territory since they might otherwise not even be in a position to have "reason to believe" that activities falling within the scope of the draft articles were being carried out in their territory. While the participation of international organizations in assisting the implementation of the obligations of prevention was welcomed by some, others felt that the role of those organizations should be more carefully examined. With regard to draft article 13 (Initiative by the presumed affected State), the requirement expressed by the phrase "serious reason to believe" was considered excessive and unhelpful in the context of both prevention and reparation of harm.

457. Draft article 17 (Balance of interests) was supported by many representatives, who observed that it was based on a well-established concept in international law and served as a guideline in negotiation among States as well as in assisting a

third party decision-maker to resolve a dispute. The remark was made that draft article 17 put draft article 9 (Reparation) in a completely different perspective and made the latter more acceptable. One representative, however, felt it unnecessary to indicate the factors or criteria on the basis of which the interests of the parties should be balanced; a general provision was viewed as sufficient.

458. As for draft article 18 (Failure to comply with the foregoing obligations), some representatives felt that, in its present form, it considerably reduced the obligation of prevention. In that context, the suggestion was made to indicate that the draft article was without prejudice to other international obligations. A few representatives saw no difficulty in stating that failure to comply with preventive obligations should constitute a wrongful act. One representative, on the other hand, felt that in the absence of harm, non-compliance with preventive measures should not give a cause of action against the State of origin.

459. The principle enunciated in draft article 20 (Prohibition of the activity) was considered reasonable and acceptable. Concerns were however expressed as to the appropriate threshold of harm or risk to trigger the obligation provided for. One representative questioned the utility of the article because of its mandatory language.

Chapter IV. Liability

460. It was generally agreed that the chapter should unequivocally provide for an obligation to pay compensation and not merely for an obligation to negotiate compensation.

461. One representative asked the Commission to make sure that the envisaged liability was not based on fault. After pointing out that a system of liability based on fault was adversarial and litigious by nature and tended to undermine the possibility of progress by negotiation, she remarked that absolute liability was also undesirable because it was too blunt an instrument and diminished any sense of a duty of care which the State of origin might owe the affected State. She therefore advocated a system of strict liability. In her view, the occurrence of transboundary harm - rather than the occurrence of fault - should set in motion the provisions of the future instrument. She added that, even if negotiations on prevention had not taken place or had not been concluded before the damage occurred, negotiations should take place between the parties after the damage had occurred on the basis of the criteria of strict liability. She further suggested that the instrument provide for a procedure to deal with unnecessary or tactical delaying at that stage of the proceedings.

462. As regards the question whether the State of origin or the operator should bear liability, views were divided. Most representatives agreed that, in case of transboundary harm, some form of liability for the State of origin should be envisaged. One view was that, without prejudice to the liability of the operator, the State of origin should bear primary liability since in the final analysis the State of origin exercised jurisdiction and control over the activities carried out in its territory at the exclusion of other States and was therefore responsible for ensuring that such activities did not cause harm to others. That responsibility,

it was stated, was the quid pro quo of State sovereignty and was without prejudice to the question of State culpability; the principal issue was that the State of origin should not be permitted to evade responsibility - an approach which was consonant with the view that an innocent victim must not be left to bear the loss. Some of these representatives acknowledged that in current State practice, operators carried primary liability, but did not view that fact as decisive in the context of the topic under consideration which dealt with a new area in which classical legal thinking was neither entirely applicable nor adequate. They further noted that transboundary harm could be of such magnitude that civil liability regimes would be inadequate to compensate innocent victims, particularly as they were dependent on the extent to which insurance companies were prepared to accept responsibility for the activities in question.

463. Another view was that the responsibility of the State of origin should only be residual, while the private operator should bear primary liability. One representative remarked that the main purpose of the draft was to establish rules aimed at ensuring that an innocent victim was not left to bear the loss and that that purpose was achieved by guaranteeing compensation: whether the compensation came from the State of origin or from the operator conducting the activity was, in practical terms, of limited importance. He observed that, unlike certain international instruments dealing with specific fields in which the operator had a well-defined and primordial role, the draft under consideration was to have a general character and should therefore strike an adequate balance between the obligations of the State and those of private parties which had conducted the activity causing transboundary harm. He pointed out that, although theoretically the State could always seek redress from the operator, a small country might find it difficult to deal with a large and powerful transnational corporation; on the other hand, as some members of the Commission had pointed out, it would be unfair to allow States to avoid liability by hiding the operators. The same representative wondered whether a decision on the doctrinal issue was really essential for a satisfactory development of the draft articles. In his opinion, the theoretical basis on which the articles were being elaborated seemed supple enough not to preclude the introduction of provisions which might in fact result in a flexible system of attribution of liability.

464. Some representatives suggested that a system be envisaged in which there would be schemes of compulsory insurance and compensation funds: States would be liable for payment of those damages which could not be recovered through domestic law remedies. A few other representatives felt that the principle of primary liability of the operator should be stated more clearly since the State's residual liability was only involved in exceptional circumstances.

465. It was also noted that, in the current State practice, operators carried liability, the only exception being embodied in the Convention on International Liability for Damage Caused by Space Objects. This was viewed as an indication that a civil liability regime would be more politically acceptable. The opinion was therefore expressed that the Commission should focus on that approach and that a well-developed civil liability regime might even make it unnecessary to provide for State liability.

Chapter V. Civil liability

466. It was generally agreed that the relationship between the articles on civil liability and those on State liability, as proposed by the Special Rapporteur, should be clarified. The representatives favouring the primary liability, or an extensive residual liability, of the State of origin felt that chapter V should envisage the possibility that civil liability might prove inadequate. Under that approach the injured party - whether a natural or juridical person or a State - would be guaranteed access to national courts, while the possibility of invoking the liability of the State of origin would not be excluded. The representatives favouring the primary liability of the operator or a limited residual liability of the State of origin felt that the principle of the liability of the operator should be given more emphasis and that a provision should be included whereby State liability would only arise when the operator was unable to fulfil his obligation to compensate.

467. As regards draft article 28 (Domestic channel), the view was expressed that it should explicitly state that all local remedies should be exhausted before State liability could be invoked and a claim submitted to the State of origin. It was also remarked that draft article 31 (Immunity from jurisdiction) should be brought in line with the draft articles on the jurisdictional immunities of States and their property in cases where the State of origin was a defendant in the courts of the injured State. A further observation was that it was perhaps unnecessary for chapter V to go into so much detail and that a provision indicating the general principles on local remedy might suffice.

3. Question of liability for harm to the environment in areas beyond national jurisdiction ("global commons")

468. All the representatives who addressed the question upheld the importance of protecting areas beyond national jurisdiction from continuous and creeping pollution. Their views, however, differed as to whether there was currently a sufficient measure of agreement to approach the problem from a legal angle.

469. Most representatives encouraged the Commission to continue its study of the problem within the framework of the topic under consideration. Emphasis was placed on the importance of the "global commons", on the fact that they were subjected to continuous pollution and on the absence of any general principles aimed at protecting them. Without denying the complexity of the issue, those representatives felt that the Commission should make every effort to provide at least some guidelines, perhaps by building on existing legal concepts, such as the old institution of Roman law, known as actio popularis, and principle 21 of the Stockholm Declaration. Referring to one of the Special Rapporteur's proposals that the legal problems involved in the protection of the "global commons" could be dealt with in the framework of State responsibility, one representative expressed concern that such an approach would be too limited and inadequate to tackle all the attendant issues.

470. Some other representatives took a different view. They emphasized the complexity of the problems involved in setting up a legal regime for the protection of the "global commons", an expression which was itself extremely difficult to define. Some of them observed that the protection of the "global commons" was a matter of international cooperation among States and should not be placed within the ambit of the legal principles governing State responsibility or liability. Others remarked that the resources at state were diverse and that that diversity dictated different legal solutions. They therefore felt it more appropriate to identify the various resources covered by the concept, such as the sea, the air, the climate, etc., and to approach the protection of each of those resources separately. A further suggestion was that the issue should be considered as an independent topic and be dealt with when the Sixth Committee deemed it appropriate.

H. OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

1. Programme, procedures and working methods of the Commission and its documentation

471. A number of representatives commented on the relationship between the Commission and other organs of the United Nations. While one of them insisted on the need for closer cooperation between the Commission and the International Court of Justice, comments in this area mostly focused on the dialogue between the Commission and the General Assembly.

472. The representatives who spoke on this point generally emphasized the need for closer cooperation. One of them, after stressing that to speak of progress in international law was to assume from the very outset that the international community, in all its diversity, would accept the product of the Commission's endeavours and be ready to convert it into a binding international instrument or a set of non-binding guidelines for the conduct of States, insisted on the need for the Sixth Committee of the General Assembly to give the Commission sufficiently clear indications about the legal and political viability of certain topics. He added that the contacts between the Commission and the Sixth Committee should be made even closer, for the Commission might otherwise run the risk of being bypassed by developments and overtaken by other forums established by States - a tendency which had already manifested itself among States and must be counteracted.

473. Another representative, after stating that the time for grand codification schemes might well be over and that what was needed in the future was work at what could be called the frontiers of law which would demand conscious policy decisions, in addition to pure legal expertise, observed that the forum in which Governments should give guidance to the Commission by addressing and settling basic policy issues was the Sixth Committee. He suggested an approach consisting of four major steps, as follows. Initially, the Committee would select a problem that was ripe for consideration by the Commission, which meant that: the issue must be a matter of genuine concern to the international community; there must be a practical need for universal legal solutions, in contrast to regional solutions; and there must be a reasonable prospect that a generally acceptable result could be achieved. Then the Commission would study the problem and identify the main issues, as well as

basic policy options. At the next stage, Governments would discuss those options in the Sixth Committee and, following negotiations, give the Commission guidance as to the direction its further work on the topic should take. Only if those basic policy decisions were generally accepted in the Committee could the final outcome of the Commission's work be expected to meet with wide approval and thus effectively shape international law. Lastly, the Commission would draft concrete legal texts in keeping with the Committee's policy decisions, it being understood that those texts would not necessarily be conventions but could take the form of guidelines or model laws, depending on the preceding debate in the Committee.

474. Still another representative expressed the opinion that in its relationship with the International Law Commission, the Sixth Committee failed to play its proper role in three respects: it did not give the Commission formal guidelines to assist it in the consideration of a topic submitted; it did not give them a precise idea of a time period within which results were expected; and it did little to assist the Commission in setting priorities between the different topics on its agenda.

475. Elaborating on his view that the role of the Sixth Committee with regard to the International Law Commission was, at the least, confused, the same representative made the following four remarks:

- First, the Committee considered draft articles without regard to the stage which the Commission itself had reached (proposals by the Rapporteur, articles approved by the Drafting Committee, articles approved on first reading, etc.), even though the Commission applied different procedures at each of those stages, and did not always have the opportunity to take into account the comments of the Committee;

- Secondly, draft articles wee discussed piecemeal, often without the Sixth Committee having the least idea of what the rest of the draft would contain;

- Thirdly, the Committee considered various draft articles without having a clear idea to whom its comments were addressed. Delegations tended to offer statements addressed to the world at large, while different audiences, whether Governments, the International Law Commission, the international legal community or national public opinion, called for different kinds of statements;

- Fourthly, delegations did not seem to keep clearly in mind the distinction between their role as government representatives and the role of Commission members as legal experts. The Committee should not interfere with the expert role of the Commission but, on the contrary, should give it policy guidance.

476. In the view of the same representative, the Committee would better perform its monitoring role towards the Commission if:

(a) It refrained from commenting on a topic until a complete first-reading text was available, subject, however, to the possibility of giving guidance to the Commission on particular points;

(b) Delegations limited their oral statements to broad issues of policy and points of substantial procedures and refrained from commenting on points of textual detail;

(c) Government comments were whenever possible submitted in writing.

477. A number of representatives suggested that, in order to enable the Sixth Committee to better contribute to the Commission's work on a topic by ensuring that it evolved in directions which Governments were likely to find acceptable, "state of the topic" reports should be presented, particularly on the topics of State responsibility and State liability. One of them however struck a note of caution in this respect, pointing out that the preparation of such reports might interfere with the conduct of the Commission's work.

478. Other comments regarding the monitoring role of the General Assembly towards the Commission included the remark that the Commission should request more regularly the opinion of Sixth Committee delegations on specific questions, and the observation that the consideration of the Commission's report should be structured as a direct dialogue between the Committee and the Commission. In this connection, the remark was made that under the current system representatives in the Sixth Committee, including members of the Commission, delivered lengthy statements the Commission's reaction to which would not be known until the publication of the next report, or even later, and that shorter statements on selected topics, and a dialogue between representatives and the Commission's members, more particularly the Special Rapporteurs, would be preferable.

479. Concern for a meaningful dialogue between the Commission and the Sixth Committee also prompted comments and suggestions on the format of the Commission's report to the General Assembly. Those comments and suggestions are reflected in paragraphs 496 to 499 below.

480. The question of the programme of work for the next session was viewed as especially important with the current term of the members of the Commission drawing to a close. 9/ One representative said that the Commission should make every effort to conclude the second reading of the draft articles on jurisdictional immunities of States and their property during the current term of office of its members. He observed in that connection that substantial progress had been made, thanks to the efforts of the Special Rapporteur. Another representative expressed the view that highest priority should continue to be given to the draft Code of

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9/ Referring to the question of the elections to be held at the next session of the General Assembly, one delegation reiterated its view that the applicable rules for nominations and the time-limits for their submission should be adhered to in the interest of ensuring fairness and the maximum range of choice.

Crimes against the Peace and Security of Mankind, inasmuch as rapid implementation of the Code would contribute to maintaining international peace and security and would create favourable conditions for the success of the United Nations Decade of International Law. Still another representative endorsed the Commission's intention to complete at its next session the second reading of the draft articles on jurisdictional immunities of States and their property and to give priority to the draft Code and to the law of the non-navigational uses of international watercourses.

481. Several representatives emphasized that, since the Commission was about to conclude its work on some of the items before it, it was appropriate to give some thought to its long-term programme of work. All of them expressed satisfaction with the report of the Working Group established to that end by the Commission. 10/ The general criteria for the selection of new topics as listed in paragraph 2 of the report generally met with approval. Among those criteria, the time element was singled out by two representatives. One of them said that new topics should be limited in scope, if possible, so that they could be concluded swiftly. The other shared the view that new topics should be manageable with regard to their time requirements and added that the time frame should not exceed the term of office of the Commission's members. The Working Group's recommendation to give priority to "topics designed to provide practical answers to current issues of legal policy in various areas of international life" met with approval. One representative observed in this connection that any operation of gradually codifying and developing international law should consist of adapting existing law to new realities and that, given the growing economic disparities among peoples, there was an obvious need to develop legal instruments that would ensure economic cooperation and development.

482. Other comments on the criteria to be used in choosing new topics included the remark that topics of practical interest should have priority over theoretical topics and the observation that, in view of the negative consequences and uncertainties that failure of the codification process could entail for the law in question, real prospects for the success of codification should be taken into account so that the convention drafted would have all possible chances of entry into force within a reasonable amount of time. In this connection, the view was expressed that the Commission should have the courage to defer, or even to adjourn sine die, the consideration of topics on which draft articles stood little chance of being accepted by States.

483. As to specific topics for inclusion in the Commission's programme of work, the general remark was made that due account should be taken of the objectives of the Decade of International Law and the programme of action relating thereto and of the views of Member States in this respect, particularly those relating to the progressive development of international law and its codification.

10/ See Official Records of the General Assembly, Forty-fifth Session, Supplement No. 10 (A/45/10), note 325.

484. Several representatives placed emphasis on economic issues. One representative noted in this connection that the topics suggested by the Working Group included "the international law of economic relations", in particular, "the regulation of foreign indebtedness", "legal aspects of contracts between States and foreign cooperatives" and "legal aspects of economic development". Another representative felt that the time was ripe to begin work on the legal principles regulating the protection of investments, possibly in the form of a model law.

485. Several representatives furthermore mentioned environmental matters and the legal principles regulating the protection of the environment. In this connection, one representative observed that this was an enormously important but also immensely complex subject that could not be dealt with by lawyers alone and that, although the Commission would certainly not be the only body studying the matter, the Sixth Committee should reflect on the role which the Commission could play in that larger undertaking.

486. One representative, referring to recent claims for asylum, drew attention to article 14 of the Universal Declaration of Human Rights, article 1 of the Declaration on Territorial Asylum (General Assembly resolution 2312 (XXII)) and article 6 of the Charter of the Nürnberg Tribunal, expressed the view that the relevant principles laid down in the legal instrument in question should be consolidated as part of the process of the codification of international law.

487. Other topics which were mentioned as deserving consideration by the International Law Commission included the legal aspects of international traffic in weapons; international drug trafficking; disarmament; the consequences of objections to inadmissible reservations; the question of the implementation of United Nations resolutions and the legal consequences of their non-implementation; and the question of the binding nature of Security Council resolutions.

488. As regards working methods, some representatives commended the Commission on some useful innovations. Mention was made in this connection of the now accepted practice of staggering the consideration of subjects and of the increasing frequency with which the Commission sought guidance from the Sixth Committee on specific issues.

489. The Commission's decision to focus during the first two weeks of its next session exclusively on work in the Drafting Committee was noted with satisfaction. In this connection, the remark was made that increased membership, further to a reform prompted by aspirations of developing countries, might overburden the Commission's mechanism; intensification of the work of the Drafting Committee, possibly through the convening of meetings between regular sessions of the Commission, was viewed as a way of alleviating the problem and increasing the Commission's efficiency. Also with a view to enhancing the effectiveness of the Drafting Committee, it was suggested to make available to the Committee a computerized database enabling it to consult the texts of bilateral and multilateral instruments. As for the idea of dividing the Commission into representative subcommittees on particular topics, it was described as attractive even though it entailed the risk that such subcommittees might work independently of each other.

490. Several representatives were of the view that the working methods of the Commission called for further improvement. Reference was made in this context to the length of time spent on some topics, to the sometimes excessively theoretical nature of that work and to the modest number of articles submitted to the Commission.

491. Suggestions aimed at increasing the Commission's productivity and enhancing the effectiveness of its work focused on ways of eliciting quick responses from the Commission and on procedures whereby the Commission could be provided with the interdisciplinary expertise which it needed.

492. As regards the first point, various suggestions were made. One of them was that the Commission should be invited to consider ways in which initial studies could begin immediately after the General Assembly's autumn session, rather than waiting until the start of the Commission's annual session, six months later. Another was that the Sixth Committee should make it the normal practice to indicate the time frame within which the Commission should endeavour to submit an initial progress report providing an overall view of the direction a particular topic was taking. Several representatives welcomed the trend towards addressing to the Commission rather limited and specific requests for legal opinions on issues of immediate concern to the international community. The remark was made that, in providing that very valuable service to the General Assembly, the Commission could use methods of work such as that followed in the handling of the question of an international criminal jurisdiction. It was pointed out in this connection that the Assembly had asked the Commission to examine that question at its previous session and that, less than a year later, the Sixth Committee had received from the Commission a comprehensive and clear response.

493. As regards ways of providing the Commission with the interdisciplinary expertise it needed, one representative drew attention to the virtual disappearance of problems that could be solved by succinct analysis and clear legal logic alone, and to the growing number of topics which required a great deal of economic, technical or scientific knowledge. He pointed out that referring subjects which demanded such interdisciplinary expertise to specialized forums would mean that the Commission would lose its pivotal position in the progressive development of international law and would no longer be fully utilized for the benefit of the world community. He suggested as other approaches that the Commission consider interdisciplinary subjects jointly or in close cooperation with bodies of technical experts or that it conduct hearings to tap the expertise of scientific institutions and individual experts - a procedure which was increasingly made use of by parliaments, courts and commission and which the Commission could profitably resort to under article 16 (e) of its statute.

494. The same representative observed that the increasing complexity of the issues before the Commission and the growing need for speed raised the question of whether the existing system of having just one Special Rapporteur for each topic was still adequate. He suggested that when highly complicated issues needed to be considered, it might be advisable to entrust more than one person with the topic. After recalling that in a number of cases the Commission had actually made use of small working groups on particular subjects and that, under article 16 (d) of its

statute, it was empowered to appoint other members to work with the Rapporteur on the preparation of drafts, he suggested considering the possibility of appointing two Co-Rapporteurs in addition to the Special Rapporteur. This suggestion was endorsed by one representative who observed that reports would then reflect a wider range of opinions and be more likely to obtain acceptance by Member States. Another representative, however, held the view that the appointment of a Co-Rapporteur did not appear to be advisable. He instead suggested the following two alternatives: either a Special Rapporteur could be assisted by an expert who was not a member of the Commission, or a research group within the Commission could assist the Special Rapporteur in determining the approach to be taken with regard to the topic assigned to him.

495. Also referring to the content of the reports of Special Rapporteurs, one representative stressed that, although State practice was no doubt of the greatest importance, more weight should be given to its contemporary and more recent manifestations, adding that, for example, little inspiration could be drawn from the Boxer Rebellion.

496. Several delegations commented on the content and time of issuance of the Commission's report - two related issues since, in the words of one representative, the fullness of the report led to its lateness.

497. While some representatives placed emphasis on the need to transmit the Commission's report to Governments as soon as possible after the end of the session (one of them suggesting that a summary of developments with regard to each topic - and the draft articles - be sent in advance of the report itself), the other representatives who spoke on the subject focused on ways of shortening the report rather than on ways of expediting its circulation. It was remarked in this connection that shorter reports would take less time for the Commission to adopt and would be less likely to prompt, in the Sixth Committee, long and detailed comments which served little practical purpose at the stage at which they were offered. It was also said that a report which, for lack of time, could not be studied thoroughly by the people to whom it was primarily addressed, i.e., the representatives of States, lost much of its practical value, no matter how high its academic standards.

498. As to concrete ways of shortening the report, one representative felt it unnecessary to repeat every year the history of each topic or to give a detailed explanation of the consideration of topics at a particular session. He observed that currently some details were included both in the section containing a general description of the Commission's work and in the individual sections dealing with the consideratiaon of each particular topic. Other representatives questioned the usefulness of presenting in each report a detailed summary of debates in the Commission at each stage of its consideration of proposed draft articles. In their opinion, such discussions should be covered in the summary records and find their way into the report only at such time when a complete set of draft articles had been adopted on first reading.

499. Other comments on the format of the report included the observation that it would be useful to know whose opinions were hidden behind such expressions as "some members", "the remark was made" or "a further view was".

500. As regards the duration of the session, the view was expressed - an opinion which was endorsed by the General Assembly in paragraph 10 of resolution 45/41 - that, given the magnitude and complexity of the subjects on the Sixth Committee's agenda, the current pattern should not be changed. The remark was however also made that the annual session might be split into two parts, even though this would have financial implications. One representative felt that the holding of special sessions should not be considered unless the Commission was to finalize a set of draft articles.

2. Cooperation with other bodies

501. Some representatives stressed that it would be useful for the Commission to maintain close cooperation with regional bodies or scientific institutions in the legal field. One of them singled out among such bodies the Asian-African Legal Consultative Committee and another referred to the International Law Association.

3. International Law Seminar

502. Several representatives stressed the importance of the International Law Seminar and emphasized the need to encourage events which facilitated the participation of developing countries in the process of the dissemination of international law.